

Good for What Ails You: Prescriptions for Employee Benefits Challenges

Presented By:

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Agenda

- Recent changes to applicable law
 - Retirement Plans
 - Welfare Benefits Plans
- Common employee benefits challenges
 - Retirement Plans
 - Welfare Benefits Plans



Changes – Retirement Plans

- SECURE Act
 - Enacted December 2019; Amendment must be adopted by the last day of the first plan year beginning on or after January 1, 2022
- General requirements
 - No loans using credit cards
 - Expanded 401(k) eligibility for elective deferrals for employees credited with at least 500 HOS, beginning January 1, 2021
 - Qualified Birth or Adoption Distributions - \$5,000
 - Defined contribution plans – lifetime income calculation

Changes – Retirement Plans

- SECURE Act (cont.)
 - Eliminate stretch RMD rule for beneficiaries, other than spouse, minor children, and certain other beneficiaries
 - Increase required beginning date to age 72, for anyone who attains age 70½ after December 31, 2019

Changes – Retirement Plans

- SECURE Act (cont.)
 - Permits transfers of certain lifetime income annuities to another employer-sponsored retirement plan or IRA (401(a), 401(k), 403(b), governmental 457(b))
 - Expands opportunity to terminate 403(b) Plans with custodial accounts
 - Modifies qualified disaster distributions of up to \$100k
 - Defined benefit plans: (i) modifies nondiscrimination requirements for closed plans; (ii) allows plan to permit in-service distributions at age 59½

Changes – Retirement Plans

- CARES Act
 - Enacted March 2020; Amendment must be adopted by the last day of the first plan year beginning on or after January 1, 2022
- General requirements
 - Coronavirus-related distributions before December 31, 2020
 - Coronavirus-related loans
 - Delay of loan repayments
 - No RMDs for 2020
 - Defined Benefit Plans: (i) delay for certain minimum contributions; (ii) election regarding AFTAP

Changes – Welfare Benefits Plans

- ARPA COBRA Premium Subsidy
 - Effective April 1, 2021 – September 30, 2021
 - The COBRA subsidy remains available to individuals who are eligible to receive it (“assistance eligible individuals” or “AEIs”) until they are permitted to enroll in other group health plan coverage.



Changes – Welfare Benefits Plans

- ARPA COBRA Premium Subsidy
 - The Notice clarifies which types of reductions in hours and involuntary terminations qualify an individual for premium assistance.
 - An individual may become an AEI more than once. The guidance also explains that when the first COBRA qualifying event is one that does not trigger a premium assistance requirement (for example, a divorce), a subsequent involuntary termination or reduction in hours will not make the individual an AEI.

Changes – Welfare Benefits Plans

- ARPA COBRA Premium Subsidy
 - Employers may require self-certification regarding eligibility for premium assistance. Employers who do so must keep a record of the attestation in order to substantiate eligibility for the corresponding payroll tax credit. (discussed later)
 - The deadline extensions under EBSA Disaster Relief Notice 2021-1 do not extend the notice or election deadlines for subsidized COBRA coverage under the ARPA. In addition, for AEIs who experienced a loss of coverage before April 1, 2021, retroactive coverage remains available. However, an AEI who elects subsidized coverage must also elect or decline retroactive COBRA coverage within 60 days of receiving notice of the ARPA's extended election period.

Changes – Welfare Benefits Plans

- Consolidated Appropriations Act, 2021
 - New patient protections which take effect in 2022. HHS, DOL, and IRS have issued guidance regarding the requirements
 - ERISA 408(b)(2) required disclosures by service providers receiving \$1,000 or more in direct or indirect compensation from brokerage, recordkeeping, administration, wellness, consulting, compliance, TPA, or similar services
 - Description of services, fiduciary status, and disclosure of compensation
 - Applies for service agreements which are entered into after December 27, 2021

Changes – Welfare Benefits Plans

- Cafeteria, Health FSA, and Dependent Care FSA Plans
 - 2020 and 2021 Plan Year Carryovers
 - Grace Period Extensions
 - Dependent Care FSA carryover for children age 13/14
 - Dependent Care FSA limit increased to \$10.5k for 2021
 - Prospective mid-year election changes
 - Expansion of allowable expenses for Health FSAs and HRAs, including over-the-counter drugs without a prescription
 - Express permission for retroactive amendments

Changes – Welfare Benefits Plans

- Educational Assistance Plans – CARES Act, ARPA
 - Limited to \$5,250
 - Typically limited to tuition, fees, books, supplies, equipment and similar payments
 - New student loans are an eligible expense until December 31, 2025



Challenges – Retirement Plans

- PTE 2020-02 (issued 12/2020)
 - Allows financial institutions and investment professionals who provide fiduciary investment advice to receive various forms of otherwise prohibited compensation if they comply with certain requirements
 - Effective February 16, 2021
 - FAQs summarize the reinstated five-part test for fiduciary investment advice, as well as the DOL's reinterpretation of that test to cover IRA rollover advice

Challenges – Retirement Plans

- EBSA Cybersecurity
 - For Plan Administrators: Tips for Hiring a Service Provider with Strong Cybersecurity Practices
 - For TPAs and Recordkeepers: Cybersecurity Program Best Practices
 - For Participants: Online Security Tips

Challenges – Retirement Plans

- Cybersecurity for Plan Administrators: Tips for Hiring a Service Provider with Strong Cybersecurity Practices
 1. What are TPA's information security standards, practices and policies, and audit results?
 2. How does TPA validates its practices?
 3. What is the TPA's track record, including security incidents?
 4. What is TPA's experience with security breaches?
 5. What is the TPA's insurance?
 6. TPA's contract should require compliance with security standards

Challenges – Retirement Plans

- EBSA Cybersecurity for TPAs and Recordkeepers: Cybersecurity Program Best Practices
 1. Have a formal, well documented cybersecurity program
 2. Conduct prudent annual risk assessments
 3. Have a reliable annual third-party audit of security controls
 4. Clearly define and assign information security roles and responsibilities
 5. Have strong access control procedures
 6. Ensure that any assets or data stored in a cloud or managed by a third party service provider are subject to appropriate security reviews and independent security assessments

Challenges – Retirement Plans

- EBSA Cybersecurity for TPAs and Recordkeepers: Cybersecurity Program Best Practices (cont.)
 7. Conduct periodic cybersecurity awareness training
 8. Implement and manage a secure system development life cycle (SDLC) program
 9. Have an effective business resiliency program addressing business continuity, disaster recovery, and incident response
 10. Encrypt sensitive data, stored and in transit
 11. Implement strong technical controls in accordance with best security practices
 12. Appropriately respond to any past cybersecurity incidents

Challenges – Retirement Plans

- EBSA Cybersecurity for Participants: Online Security Tips
 1. Register, set up and routinely monitor your online account
 2. Use strong and unique passwords
 3. Use multi-factor authentication
 4. Keep personal contact information current
 5. Close or delete unused accounts
 6. Be wary of free wifi
 7. Beware of phishing attacks



Challenges – Retirement Plans

- EBSA Cybersecurity for Participants: Online Security Tips (cont.)
 7. Beware of phishing attacks
 8. Use Antivirus software and keep apps and software current
 9. Know how to report identify theft and cybersecurity incidents

Challenges – Retirement Plans

Hughes et al. v. Northwestern University et al., cert granted 2021 WL 2742780 (July 2, 2021) - Plaintiff's claim that Northwestern University's 403(b) Plans offered 129 retail-class mutual funds even though identical institutional-class mutual funds were available to the plans; plans should not have used more than one recordkeeper; plans should have assessed fees on a flat annual fee rather than bps. Question Presented: *Whether allegations that a defined contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1104(a)(1)(B).*

Challenges – Retirement Plans

- Lifetime Income Illustrations
 - SECURE Act requires 2 lifetime income illustrations to be furnished at least annually
 - Effective Date - Plans that issue quarterly statements can incorporate their first lifetime income illustration only any quarterly statement up to the 6/30/22 statement
 - Final Rule due September 18, 2021; not issued yet

Challenges – Welfare Benefits Plans

- EBSA Disaster Relief Notice 2020-01
 - Requires plan administrators to disregard the period beginning March 1, 2020 and ending 60 days after the announced end of the COVID-19 emergency for several purposes, including COBRA election deadlines, HIPAA special enrollment deadlines, and appeals deadlines.
- EBSA Disaster Relief Notice 2021-01
 - Deadline by which an action must be taken will be tolled “until the earlier of: (a) 1 year from the date [the individual or plan was] first eligible for relief, or (b) 60 days after the announced end of the National Emergency
- National Emergency extended February 24, 2021
- IRS Notice 2021-58 issued October 6, 2021 with additional guidance

Challenges – Welfare Benefits Plans

- Use of Wellness Plan Incentives to encourage COVID-19 vaccines
 - Guidance issued by HHS, DOL, and IRS on October 4, 2021
 - Participatory – none of the conditions for obtaining a reward are based on an individual satisfying a standard related to health care
 - Health-contingent – requires an individual to satisfy a standard related to a health factor to obtain a reward
 - Either activity-only or outcome-based
 - 30% incentive limit (50% if tobacco-related)



Challenges – Welfare Benefits Plans

- Use of Wellness Plan Incentives to encourage COVID-19 vaccines
 - Tri-Agencies take the position that vaccine premium incentives are “activity-only” health-contingent programs, meaning the more restrictive conditions apply
 - Vaccine-related incentives must meet several conditions, including
 - The program is reasonably designed to promote health or prevent disease (in an example in the new guidance, the employer provided a toll-free hotline to answer questions about the vaccine and provide assistance with scheduling appointments)

Challenges – Welfare Benefits Plans

- Use of Wellness Plan Incentives to encourage COVID-19 vaccines – Conditions
 - Program provides for a reasonable alternative must be provided to obtain the reward for those for whom it is unreasonably difficult due to a medical condition or medically inadvisable to receive the COVID-19 vaccine (in an example in the new guidance, the reasonable alternative is requiring the individual to provide an attestation that the individual will follow CDC masking guidelines for unvaccinated individuals)

Challenges – Welfare Benefits Plans

- Use of Wellness Plan Incentives to encourage COVID-19 vaccines - Conditions
 - the reward (when added to all other wellness incentives for health-contingent programs) must not exceed 30% of the total cost of employee-only coverage (or, if a dependent can earn the incentive too, the cost of the coverage in which the employee and dependent are enrolled).
 - Cannot condition eligibility for benefits on vaccination status
 - Vaccine incentive is not treated as an employer contribution for ACA affordability purposes

Questions?

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PRESENT POSITION

Keith is a partner at Cline Williams Wright Johnson & Oldfather, L.L.P., and the chair of the Employee Benefits practice group. Keith's practice focuses solely on employee benefits and executive compensation. He counsels clients on all forms of welfare benefits plans, as well as qualified and non-qualified retirement plans, including a specialty regarding employee stock ownership plans (ESOPs). He works with clients responding to audits by the Internal Revenue Service and the U.S. Department of Labor.

MEMBERSHIPS AND DESIGNATIONS

Keith holds a license to practice law in Nebraska and is admitted to practice before Nebraska state and federal courts.

PRIOR EXPERIENCE AND EDUCATION

Keith has spent his entire legal career at Cline Williams. He earned his Juris Doctor, with high distinction, from the University of Nebraska College of Law, where he was the Articles Editor of the Nebraska Law Review. He received his Bachelor of Arts, with high honors, from Cedarville University.